



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 16, 1998

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-1480

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115827.

The Texas Natural Resource Conservation Commission ("the TNRCC") received a request for the following:

1. Any documents related to a proposal by the Lower Colorado River Authority and/or The Texas Parks and Wildlife Department to apply pesticides to Lake Bastrop in 1998.
2. Any documents related to any treatment by pesticides (including herbicides) by the Lower Colorado River Authority and/or The Texas Parks and Wildlife Department of Lake Bastrop, Fayette Lake or Decker (Water E. Long) Lake from 1970 through the end of 1997.
3. Any documents related to any review, consultation, water quality assessment (including, but not limited to, any review of compliance with the state antidegradation policy) or approval by TNRCC or its predecessor agencies of the proposed or actual treatments identified in items 1 or 2 above.
4. Any documents related to any inspection or sampling by TNRCC or its predecessor agencies after any of the treatments identified in item 2 above.
5. Any documents related to the harmful or beneficial effects of hydrilla on water quality, including, but not limited to, the effects on pH levels
6. Any rules, policies or guidance of TNRCC regarding the application of herbicides to Texas waters.

You state that the TNRCC has provided the requestor with some information that is responsive to the request. However, you assert that other responsive information is excepted from disclosure pursuant to sections 552.110, 552.111 and 552.112¹ of the Government Code. You submitted representative samples of the records to this office for review, marked to show the exceptions asserted.²

The records submitted were in part those from Elf Atochem of North America, Inc. ("Elf Atochem"). Pursuant to section 552.305 of the Government Code, the TNRCC has not taken a position on whether any of these documents are confidential, but asks this office to determine whether the submitted records are excepted from disclosure under section 552.110 of the Government Code. We observe that section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2. Consequently, this office notified Elf Atochem of the request for information. Elf Atochem responded by asserting that the records at issue in are protected under section 552.110.

Accordingly, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

¹In subsequent correspondence to this office, you abandon any argument of section 552.112 and we shall treat that omission as a withdrawal of that particular exception in the instant matter.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. *Open Records Decision No. 552* (1990) at 5-6.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In *Open Records Decision No. 639* (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. *Open Records Decision No. 639* (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

The highlighted information in the February 1994 memorandum represents Elf Atochem's sales figures for Endothall products in Texas as well as sales broken down by specific product. Elf Atochem asserts that the marked portions contain certain aggregated information on sales in market surveys. Relatedly, Elf Atochem states that this information is only reported as regional or national sales and the information is not reported as sales specific to individual states. It maintains that it developed this data in order to properly

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

direct its efforts and activities in the state, and the resources expended by the company in Texas are based on this information. These portions of the memorandum constitute a break down of Elf Atochems's competitive position, and it has demonstrated that releasing these portions will cause it to suffer substantial competitive harm. Consequently, we find that the highlighted portions of the February 1994 memorandum are excepted from disclosure under section 552.110 as commercial or financial information.

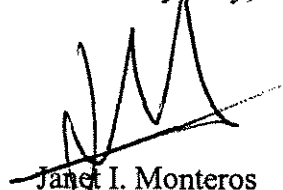
Next, we observe that section 552.111 excepts from disclosure inter-agency or intra-agency communications to the extent that they contain advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. We note that this office had previously held that section 552.111 was applicable to the advice, opinion, and recommendations used in decision-making processes within an agency or between agencies. Open Records Decision Nos. 574 (1990) at 1-2, 565 (1990) at 9. However, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court addressed the proper scope and interpretation of this exception to disclosure. In light of that holding, in Open Records Decision No. 615 (1993) at 5, this office concluded:

to come within the [section 552.111] exception, information must be related to the policymaking functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters. . . .

We have examined the documents that you claim are protected by section 552.111. We agree that the information at issue is related to the policymaking functions of TNRCC. Section 552.111 is thus applicable to the submitted records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Janet I. Monteros", is written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/gle

Ref.: ID# 115827

Enclosures: Submitted documents

cc: Mr. Richard Lowerre
Henry, Lowerre, Johnson, Hess & Frederick
202 West 17th Street
Austin, Texas 78701
(w/o enclosures)